

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 78-6659

JOHNNY L. BLAKE,
Petitioner,

v.

VINSON F. THOMPSON,
Warden,
Respondent.

Brief of Resp. in Opposition

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES-----	ii
OPINIONS BELOW-----	1
JURISDICTION-----	2
QUESTIONS PRESENTED-----	2
STATEMENT OF THE CASE-----	2
ARGUMENT FOR DENYING CERTIORARI-----	4
I. THE COURT OF APPEALS PROPERLY DECIDED THIS CASE ON THE SUFFICIENCY OF THE EVIDENCE UNDER THE REVIEW STANDARD APPLICABLE AT THE TIME-----	4
II. EVEN SHOULD THE STANDARD ENUNCIATED IN JACKSON V. VIRGINIA, BE APPLICABLE, THE DISTRICT COURT'S FINDING OF PROCEDURAL DEFAULT PRECLUDES FEDERAL HABEAS CORPUS REVIEW OF THIS ISSUE-----	5
CONCLUSION-----	9
CERTIFICATE OF SERVICE-----	9

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
Blake v. Morford, 563 F.2d 248 (6th Cir. 1977) <u>cert. denied</u> 434 U.S. 1038 (1978)-----	4,8
Boyer v. Patton, 579 F.2d 285 (3rd Cir. 1978)-----	7
Brooks v. Rose, 520 F.2d 775 (6th Cir. 1975)-----	4
Davis v. United States, 411 U.S. 233 (1973)-----	5
Ennis v. LeFevre, 560 F.2d 1072 (2nd Cir. 1977), <u>cert. denied</u> 435 U.S. 976 (1978)-----	7
Estelle v. Williams 425 U.S. 501 (1976)-----	5
Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977)-----	7
Faust v. North Carolina, 307 F.2d 869 (4th Cir. 1962)-----	4
Fay v. Noia, 372 U.S. 391 (1963)-----	5,7
Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977)-----	7
Francis v. Henderson, 425 U.S. 536 (1976)-----	5
Frazier v. Czarnetsky, 439 F.Supp. 735 (S.D. N.Y. 1977)-----	7
Gale v. Harris, 580 F.2d 52 (2nd Cir. 1978)-----	7
Gant v. State, 507 S.W.2d 133 (Tenn. Crim. App. 1973)-----	6
Jackson v. Virginia, 45 U.S.L.W. 4883 (U.S. June 28, 1979)-----	5,8
Jenkins v. Wainwright, 488 F.2d 136 (5th Cir. 1973)-----	5
Kirby v. State, 214 Tenn. 296, 379 S.W.2d 780 (1964)-----	6
Phillips v. State, 3 Tenn. Crim. App. 184, 458 S.W.2d 842 (1970)-----	6
Robinson v. Wolf, 468 F.2d 438 (8th Cir. 1972)-----	5

Cases:

Page

<u>Spinkellink v. Wainwright,</u> 578 F.2d 582 (15th Cir. 1978), cert. denied, ___ U.S. ___, 99 S.Ct. 1548 (1978)-----	7
<u>Thompson v. City of Louisville,</u> 362 U.S. 199 (1960)-----	5
<u>Tifford v. Wainwright,</u> 588 F.2d 954 (5th Cir. 1979)-----	7
<u>United States ex rel. Carbone v. Manson,</u> 447 F.Supp. 611 (D. Conn. 1978)-----	7
<u>United States v. Griffin,</u> 409 F.2d 1300 (2d Cir. 1969)-----	4
<u>Wainwright v. Sykes,</u> 433 U.S. 72 (1977)-----	5-7
<u>Waycaster v. State,</u> 566 S.W.2d 846 (Tenn. 1977)-----	6
<u>OTHERS:</u>	
Rule 2(c) of Rules Governing §2254 Cases in the United States District Court-----	8
Rule 9(b) of Rules Governing §2254 Cases in the United States District Court-----	8
Tenn. Sup. Ct. R. 15(2)-----	6

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OCTOBER TERM, 1979

NO. 78-6659

JOHNNY L. BLAKE,
Petitioner,

v.

VINSON F. THOMPSON,
Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

The respondent respectfully submits that the petition
for writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

The opinions of the United States Court of Appeals
for the Sixth Circuit and the United States District
Court for the Western District of Tennessee, Western
Division, on petitioner's petition for writ of habeas
corpus, are unreported and appear attached to the petitioner's
petition for writ of certiorari at pages fifteen and
twenty, respectively.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals applied the proper standard in reviewing the sufficiency of the evidence on a federal habeas corpus case.

2. In any event, whether petitioner is foreclosed from raising this issue by a procedural default in state appellate proceedings.

STATEMENT OF THE CASE

Petitioner Blake was indicted by the Shelby County Grand Jury for first degree murder on July 3, 1973. He was convicted of this offense and sentenced to ninety-nine (99) years in the state penitentiary on March 21, 1974. In his motion for a new trial, petitioner raised the issue of sufficiency of the evidence. Petitioner appealed to the Court of Criminal Appeals of Tennessee, raising the issue of sufficiency of the evidence as a basis for relief. On May 20, 1975, the Court of Criminal Appeals affirmed his conviction, expressly denying relief on this ground. Petitioner petitioned to the Supreme Court of Tennessee for a writ of certiorari but did not raise the sufficiency of the evidence issue. On September 8, 1975, the Supreme Court of Tennessee denied his petition for writ of certiorari. (Petitioner's Appendix p. 16).

On December 19, 1977, the petitioner filed this pro se petition for writ of habeas corpus. On January 13, 1978, respondent filed a motion for summary judgment

and/or dismissal and a response to the petition accompanied by exhibits. On January 24, 1978, respondent filed the State court transcript. On May 5, 1978, the petitioner filed a memorandum opposing respondent's motion for summary judgment.

On May 22, 1978, the Honorable Harry W. Wellford, Judge of the United States District Court for the Western Division found, based on the petition for writ of habeas corpus and exhibits, that petitioner was required to demonstrate "cause" and "prejudice" for his failure to raise the sole issue in this petition for writ of habeas corpus, the sufficiency of the evidence, in his petition for certiorari to the Supreme Court of Tennessee although he had raised it in the direct appeal to the Court of Criminal Appeals of Tennessee. The court went on to consider the merits of the petitioner's allegation and found "all the evidence contained in the record considered, it does not appear that the conviction was devoid of evidentiary support so that it constitutes a violation of petitioner's Fourteenth Amendment due process rights." The court afforded the petitioner thirty (30) days in which to demonstrate "cause" and "prejudice" and the same period of time for petitioner's counsel to persuade the court there was no relevant evidence whatever to support the jury's finding of guilt. After receiving no response, the court dismissed this petition for writ of habeas corpus on July 13, 1978, based on its Memorandum Opinion. (Petitioner's Appendix 15-19).

On August 11, 1978, the petitioner filed a notice of appeal and request for certificate of probable cause. On August 24, 1978, the trial court granted this certificate. On February 9, 1979, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District

Court. (Petitioner's Appendix p. 20).

A synopsis of the evidence presented in the state court is found in Blake v. Morford, 563 F.2d 248, 249 (6th Cir. 1977), cert. denied, 434 U.S. 1038 (1978).

ARGUMENT FOR DENYING CERTIORARI

Respondent insists that the Court of Appeals correctly affirmed the judgment of the District Court which held that petitioner had procedurally defaulted on his claim of insufficiency of the evidence to support his conviction by failing to present this issue to the Supreme Court of Tennessee after having presented the issue to the Court of Criminal Appeals and that there was evidence to support the jury's finding. At the time of its decision on February 9, 1979, the Court of Appeals did not come into conflict with another court of appeals or applicable state law, nor did it decide a question which has yet to be settled by this Court or reach a conclusion conflicting with applicable decisions of this Court, or raise any issue which merits this Court's review on writ of certiorari. See Supreme Court Rule 19(1)(b). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

I.

THE COURT OF APPEALS PROPERLY DECIDED THIS CASE ON THE SUFFICIENCY OF THE EVIDENCE UNDER THE REVIEW STANDARD APPLICABLE AT THE TIME.

In reaching its determination on the merits of the case, the Court of Appeals properly applied existing federal habeas corpus standards for reviewing the sufficiency of the evidence. Brooks v. Rose, 520 F.2d 775, 777 (6th Cir. 1975). The rule at that time was similarly accepted in other circuits. See United States v. Griffin, 409 F.2d 1300 (2d Cir. 1969); Faust v. North Carolina,

307 F.2d 869 (4th Cir. 1962); Jenkins v. Wainwright, 488 F.2d 136 (5th Cir. 1973); Robinson v. Wolf, 468 F.2d 438 (8th Cir. 1972). See also Thompson v. City of Louisville, 362 U.S. 199 (1960).

On June 27, 1979, this Court decided Jackson v. Virginia, 45 U.S.L.W. 4883 (U.S. June 28, 1979) in which this court held that the reviewing standard for the sufficiency of the evidence was whether the evidence was sufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt.

II.

EVEN SHOULD THE STANDARD ENUNCIATED IN JACKSON V. VIRGINIA, BE APPLICABLE, THE DISTRICT COURT'S FINDING OF PROCEDURAL DEFAULT PRECLUDES FEDERAL HABEAS CORPUS REVIEW OF THIS ISSUE.

Even were the standard enunciated in Jackson v. Virginia, 45 U.S.L.W. 4883 (U.S. June 28, 1979) applicable, the District Court's finding of a procedural default precludes federal habeas corpus review of petitioner's allegation. In Jackson, 45 U.S.L.W. at 4887, this Court held that to properly raise this issue no independent and adequate state ground can stand as a bar, citing Estelle v. Williams, 425 U.S. 501 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977); Fay v. Noia, 372 U.S. 391 (1963). In the instant case, the procedural prerequisites for petitioner Blake's raising this issue have not been met.

In Wainwright v. Sykes, 433 U.S. 72 (1977), this Court held that where the petitioner failed to object to the admission of testimony which violated Miranda, a federal court could not consider the Miranda claim, absent a showing of cause for the failure to object and prejudice resulting from the failure. See Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973). In the instant case, the District

held that the petitioner must meet the cause and prejudice standard before he could raise the issue concerning sufficiency of the evidence by petition for writ of habeas corpus. The petitioner did not allege or submit any basis for meeting this standard.

Petitioner raised the ground of sufficiency of the evidence in his motion for a new trial filed in the State court. (Petitioner's Appendix at p. 16). Under Tennessee procedure, this is a prerequisite to assigning error upon such a basis on appeal. Kirby v. State, 214 Tenn. 296, 379 S.W.2d 780 (1964). Petitioner assigned the same error on his direct appeal to the Court of Criminal Appeals of Tennessee. However, petitioner abandoned his attack on the sufficiency of the evidence in his petition for writ of certiorari to the Supreme Court of Tennessee. (Petitioner's Appendix at p. 16). Petitioner's failure to pursue his remedy to the Supreme Court of Tennessee amounts to a procedural default on that allegation. Tenn. Sup. Ct. R. 15(2). See Waycaster v. State, 566 S.W.2d 846 (Tenn. 1977).

Under Tennessee law, a challenge to the sufficiency of the evidence is not a claim cognizable in state habeas corpus or post-conviction relief actions. Gant v. State, 507 S.W.2d 133 (Tenn. Crim. App. 1973), Phillips v. State, 3 Tenn. Crim. App. 184, 458 S.W.2d 842 (1970). The failure to pursue this issue in the Supreme Court of Tennessee thus foreclosed the petitioner from proceeding any further in State court.

The application of the procedural default rule of Wainwright v. Sykes, absent a showing of cause and prejudice, has been consistently applied to procedural defaults in the appellate process, where, as in the instant case, the determination is that made by counsel of what issues to raise before the appellate court.

Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977); Ennis v. LaFevre, 560 F.2d 1072 (2nd Cir. 1977), cert. denied, 435 U.S. 976 (1978); Frazier v. Czarnetsky, 439 F.Supp. 735 (S.D. N.Y. 1977); United States ex rel. Carbone v. Manson, 447 F.Supp. 611 (D. Conn. 1978). See Gale v. Harris, 580 F.2d 52, 53 n. 1 (2nd Cir. 1978); Spinkellink v. Wainwright, 578 F.2d 582, 592 (5th Cir. 1978), cert. denied ___ U.S. ___, 99 S.Ct. 1548 (1978) wherein the courts did not reach the procedural issues because they found the petitioner's underlying constitutional claims to be meritless.

The other cases cited by petitioner from which he alleges a conflict between the courts of appeal in the application of the Fay v. Noia, [372 U.S. 822 (1963)] "deliberate by-pass" test versus the Wainwright v. Sykes, "procedural default" test to abandonment of individual appellate issues are distinguishable. In Ferguson v. Boyd, 566 F.2d 873, 879 (4th Cir. 1977) and Boyer v. Patton, 579 F.2d 285 (3d Cir. 1978), the courts were faced with the identical factual situation raised in Fay v. Noia, the failure to appeal. This Court noted in Wainwright v. Sykes, 433 U.S. at ___, 97 S.Ct. at 2507 n. 12, that it had:

"no occasion today to consider the Fay rule as applied to the facts there confronting the Court. Whether the Francis rule should preclude federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court, we leave for another day." (emphasis supplied).

Since petitioner appealed to the Court of Criminal Appeals of Tennessee, his reliance on this language from Wainwright v. Sykes is not applicable to the facts of the instant case. Furthermore, in Tifford v. Wainwright, 588 F.2d 954, 956 (5th Cir. 1979) the issues which were alleged to have been deliberately bypassed had been considered by the Florida appellate courts.

Thus, there is no conflict in the District Court's ruling regarding procedural default with another federal court or applicable state law. Nor does this decision decide a federal question not yet settled by this court, reach a conclusion conflicting with applicable decisions of this court, or raise any issue which merits this Court's review on certiorari.

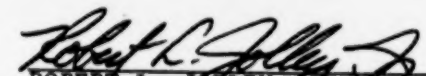
Furthermore, this petition for writ of habeas corpus was a second, successive petition on which the respondent submits an abuse of the writ could be found under Rules 9(b) and 2(c) of the Rules Governing §2254 Cases in the United States District Court. See Petitioner's Appendix at p. 15; Blake v. Morford, 563 F.2d 248 (6th Cir. 1977), cert. denied, 434 U.S. 1038 (1978).*


* The summary of the evidence contained in the Sixth Circuit's opinion in Blake v. Morford, 563 F.2d 248 (6th Cir. 1977), cert. denied, 434 U.S. 1038 (1978) clearly shows that the standard of review adopted in Jackson v. Virginia has been met in the instant case.

CONCLUSION

Respondent respectfully asks this Honorable Court to deny Johnny Blake's petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

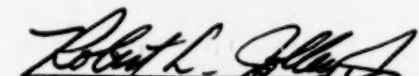
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response in Opposition to Petition for Writ of Certiorari has been forwarded by first class U.S. Mail to Richard W. Weinthal, Suite 934, 100 N. Main, Memphis, Tennessee 38103, this the 12th day of July, 1979.


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